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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 78-2

In the Interest of JOHN M. VITALE, a minor
(STATE OF ILLINOIS,

Petitioner.

vs.

JOHN M. VITALE,

Respondent.)

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

Your Petitioner, the People of the State of Illinois, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Illinois entered in the instant case on April 3, 1978.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Illinois holding that a petition for adjudication of wardship filed against the minor Respondent, John M. Vitale, violated Vitale's right against being twice placed in jeopardy for the same offense, was rendered by that court on April 3, 1978. It is to be found reported as *In Re. Vitale, a minor*, at 71 Ill. 2d 229, 375 N.E. 2d 87 (1978). In turn, the opinion of the Illinois Supreme Court from which the Writ of Certiorari is now sought, affirmed the result reached in this case by the Appellate Court of Illinois, First District, although the appellate court's reasons for finding the delinquency petition to be improper were completely different than those of the majority of the Illinois Supreme Court. The opinion of the Appellate Court, First District, is to be found reported at 44 Ill. App. 3d 1030, 357 N.E. 2d 1288 (1977). In conformity with Rule 19 of the Supreme Court of the United States, each of these opinions appears in an appendix to the present petition.

JURISDICTION OF THE COURT

The opinion of the Supreme Court of the State of Illinois affirming the earlier determination of the Appellate Court of Illinois, First District, was rendered on April 3, 1978. The jurisdiction of the Supreme Court of the United States to hear this case on Writ of Certiorari is invoked under 28 U.S.C., § 1257(3), since in the proceedings in the state

courts of Illinois the Respondent has specifically set up and throughout asserted an allegation of violation of his rights arising under the Constitution of the United States.

QUESTION PRESENTED

Whether the minor Respondent who struck and killed two small children while driving his automobile through an intersection at an excessive rate of speed and in disregard of the signal of a school crossing guard, can be the subject of a petition for adjudication of wardship seeking to have him declared delinquent on the basis of these facts notwithstanding the fact that at the scene of the collision with the two children Vitale received a traffic citation for failing to reduce speed to avoid an accident and subsequently paid a fine in connection with that traffic citation; or whether, as found by the Supreme Court of Illinois, an adjudication of delinquency under these conditions would violate Vitale's right to be free from double jeopardy under the Fifth Amendment of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V.;

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Malitia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice placed in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation".

STATEMENT OF THE CASE

A.

General Background

On November 20, 1974, an automobile operated by John M. Vitale, a minor, struck two five year old children. One child died almost at once, the other on the following day. The children were struck in a marked crosswalk while they were being assisted across the street by a uniformed school crossing guard who, at the time, was displaying a hand-held stop sign. Police investigation indicated that at the time of the striking of the children, the automobile being driven by Vitale was traveling at approximately fifty miles per hour, although at the time there was in effect a twenty mile per hour school speed limit. The area, at times when school was not in session, was posted for thirty five miles per hour. There were some seven warning signs concerning the school zone and the twenty mile per hour speed limit posted along he route which Vitale traveled before reaching the intersection. Police investigation further revealed that three out of the four brakes in Vitale's automobile were faulty. The Respondent told the officer at the scene that his attenion was diverted to his left and that when he looked back in front of him it was too late to avoid hitting the children. The officer at the scene issued a traffic citation charging John Vitale with failing to reduce speed to avoid an accident: Ill. Rev. Stat. 1973, Ch. 95½, § 11-601. On December 23, 1974, the traffic case was heard. Vitale entered a plea of guilty to the charge of failing to reduce speed, he was found guilty and a fine was imposed.

On the following day, December 24, 1974, a petition for adjudication of wardship was filed in the Juvenile Division

of the Circuit Court of Cook County which charged that John M. Vitale was a delinquent minor under Illinois law. The basis of this allegation was the incident above described, the charge being involuntary manslaughter. Vitale filed a motion to dismiss the petition alleging that in light of his having been found guilty and fined for failure to reduce speed to avoid an accident, he was being again placed in jeopardy for the same offense by the petition for adjudication of wardship. The Juvenile Court judge held that the petition did violate the minor's right to be free from double jeopardy and dismissed the petition for adjudication of wardship. From this determination the People appealed under authority of Rule 604 of the Supreme Court of Illinois: Ill. Rev. Stat. 1973, Ch. 110A, § 604. The Appellate Court of Illinois, First District, determined that the judge below was correct in dismissing the petition since it violated certain provisions in the Illinois Criminal Code dealing with compulsory joinder of causes in action. *In Re. Vitale*, 44 Ill. App. 3d 1030, 357 N.E. 2d 1288 (1977).

The People sought and obtained Leave to Appeal to the Supreme Court of Illinois from the appellate court determination. With two justices dissenting, the Illinois Supreme Court held on April 3, 1978, that the petition for adjudication of wardship was properly dismissed for the reason that it violated Vitale's Fifth Amendment right to be free from being twice placed in jeopardy for the same offense. The court held that in view of the fact that the Respondent had been fined for the traffic offense of failing to reduce speed to avoid an accident, he could not be charged with involuntary manslaughter in the deaths of the two five year old children. The dissenting opinion of Mr. Justice Underwood, concurred in by Mr. Justice Ryan, pointed out that these offenses were not the same in law or fact, that the traffic charge was not a lesser included

offense of the charge of involuntary manslaughter, and that there was no violation of the double jeopardy provision of the Fifth Amendment to the Constitution of the United States.

Seeking to overturn the determination of the majority of the justices of the Illinois Supreme Court in this case, the People now seek from this Honorable Court the issuance of the Writ of Certiorari.

B.

Facts Material To The Question Presented

Briefly stated, the facts germain to the determination of the issue herein presented are as follows.

The minor Respondent, while driving at more than twice the posted school speed limit and in complete disregard of the signal of a school crossing guard who was standing in the intersection, sped through the intersection and in the process struck and killed two small children who were attempting to cross under the guard's direction. Vitale was charged in a traffic citation with failure to reduce speed to avoid an accident, pleaded guilty in court to that traffic charge, and was fined. Subsequently, a petition seeking to have Vitale declared a delinquent minor was filed charging him with involuntary manslaughter in connection with the deaths of the two children. The judge in the Juvenile Division of the Circuit Court of Cook County dismissed the wardship petition. The Appellate Court of Illinois, First District, held that the petition was properly dismissed due to the fact that it allegedly violated certain joinder provisions of the Illinois criminal law. The Supreme Court of Illinois, stating that the compelling ground was that of former jeopardy, held that Vitale's right to be free from

being twice placed in jeopardy for the same offense was violated by the wardship petition due to the former conviction of the traffic charge and the fine imposed thereon.

C.

Manner In Which The Federal Question Was Raised

The federal question herein presented, that of the effect upon this case of the prohibition of Amendment V. of the Constitution of the United States against an accused being twice placed in jeopardy for the same offense, was first raised by John Vitale prior to a hearing on the matter by way of his motion to dismiss the petition for adjudication of wardship. Throughout the processes of appeal in the state courts of Illinois, Vitale has consistently adhered to the position that the juvenile petition violated the double jeopardy provision in light of his previously having been fined for the traffic offense of failing to reduce speed to avoid an accident. This constitutional question forms the complete basis for the opinion of the Supreme Court of Illinois from which a Petition for the Writ of Certiorari is requested of the Supreme Court of the United States.

REASONS FOR GRANTING THE WRIT

THE DELINQUENCY PETITION CHARGING JOHN VITALE WITH INVOLUNTARY MANSLAUGHTER IN THE DEATHS OF TWO SMALL CHILDREN WAS PROPERLY FILED AGAINST HIM NOTWITHSTANDING A PRIOR FINE IMPOSED FOR THE TRAFFIC OFFENSE OF FAILING TO REDUCE SPEED AND DID NOT VIOLATE VITALE'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY FOR THE SAME OFFENSE; SINCE THERE WAS NOT HERE PRESENT THE NECESSARY IDENTITY OF OFFENSES, AND SINCE THERE IS NO PROHIBITION IN THE LAW AGAINST ONE BEING SUBJECT TO MORE THAN ONE PROSECUTION WHEN HIS ACTIONS CONSTITUTE MORE THAN ONE OFFENSE.

As we have noted, John Vitale struck and killed two five year old children while driving his automobile through an interesection in complete disregard not only for posted school speed limits but also of a crossing guard who, in uniform, stood in the middle of the intersection and signaled him to stop. The officer who arrived on the scene issued a traffic ticket to Vitale charging that he failed to reduce speed to avoid an accident. Vitale subsequently pleaded guilty to the traffic charge and a fine was imposed. Vitale, a juvenile, was then made the subject of a petition for adjudication of wardship (a proceeding to determine his status as a delinquent), which was based upon the same incident. Vitale successfully moved to dismiss the petition in juvenile court on the ground that he was being twice

placed in jeopardy for the same offense due to the fact that he had already entered a plea of guilty to the traffic offense and had been the subject of a fine. The People appealed and, incredibly, both the Appellate Court of Illinois, First District, and then the majority of justices of the Supreme Court of the State of Illinois held that the dismissal of the juvenile proceeding was necessitated by the former traffic offense conviction. In particular, the majority of the Supreme Court of Illinois held that the result was mandated by the prohibition against double jeopardy contained in Amendment V of the Constitution of the United States. In his dissenting opinion below, Mr. Justice Underwood of the Illinois Supreme Court (with Mr. Justice Ryan Concurring), states (see Appendix A);

> "I have inflicted this lengthy dissent upon the reader because I believe the majority of this court has substantially broadened the double jeopardy rule it purports to follow, reaching a result which is compelled by neither the Federal Constitution nor the constitution or statutes of Illinois." (Opinion P. 6, Appendix A, p. A-9)

Mr. Justice Underwood goes on to analyze the opinion of the majority and show that it is incorrect in that there is not here present the necessitated identity of the offenses to call into play the concept of double jeopardy, nor is it true (as found by the majority) that the traffic charge of failing to reduce speed is a lesser included offense of the criminal charge of involuntary manslaughter. The People submit that in so finding Justices Underwood and Ryan were correct, that the majority opinion from which the Writ of Certiorari is herein sought is completely in error, and that this determination should not be allowed to stand since it constitutes a complete misinterpretation of the concept of prohibited former jeopardy as imbodied in Amendment V of the Constitution of the United States.

That under our system of justice one may not be twice placed in jeopardy for the same offense is abundantly clear. Constitution of the United States, Amendment V.; Constitution of the State of Illinois, Article 1, Section 10; *United States* v. *Jorn,* 400 U.S. 470 (1971). The Statutes of the State of Illinois further implement this policy in that they provide that a second prosecution for the same offense will not lie (Ill. Rev. Stat. 1975, Ch. 38, Sec. 3-4), and that when offenses can and should be tried together they may not be tried separately unless the requirements of justice to the accused require that they be separately tried. Ill. Rev. Stat. 1975, Ch. 38, Sec. 3-3. The underlying reason for this rule is to prevent the prosecution from making repeated attempts to convict an individual for the same offense and to eliminate the accompanying risk that, although innocent, that individual might eventually be convicted. *Green* v. *United States,* 355 U.S. 184 (1955). There is also no question that this constitutional protection is available to those charged as juvenile offenders. *Breed* v. *Jones,* 421 U.S. 519 (1975). What is sought to be prevented can be seen from the factual situation in the *Green* decision just cited and from that in *People* v. *Stickler,* 31 Ill. App. 3d 977, 334 N.E. 2d 475 (4th Dist., 1975). In the *Stickler* decision, the court found it a violation of the double jeopardy concept for the defendant who had been convicted of stealing certain rings, to again be charged and convicted of the theft of those same rings along with other property taken in the same offense.

However, (and this is the point missed completely by the majority of the Illinois Supreme Court), the double jeopardy prohibition concerns itself with the *identity of the offenses* and not with the identity of the act or series of acts out of which they arise. *Blockburger* v. *United States,* 284 U.S. 299 (1934); *Ciucci* v. *Illinois,* 335 U.S. 571 (1958).

The same rule has many times been followed by the Supreme Court of the State of Illinois. *People* v. *Joyner,* 50 Ill. 2d 302, 278 N.E. 2d 756 (1972); *People* v. *Hairston,* 46 Ill. 2d 348, 263 N.E. 2d 840 (1970). The test is not whether one act or series of acts is involved. The test involved is that which has become commonly known as the "same evidence rule." That is, the test is whether each of the two charges arising out of the act or series of acts involves an element of proof which the other does not. *Brown* v. *Ohio,* 432 U.S. 161 (1977); *Blackburger* v. *United States, supra.* As this Court stated in *Lanneili* v. *United States,* 420 U.S. 770 (1975), when each offense charged requires proof different from the other, there is no violation of the right to be free from former jeopardy although there may be a substantial overlap in the elements which must be proven to constitute each charged offense. See also, *Waller* v. *Florida,* 397 U.S. 387 (1970). As Mr. Chief Justice Burger phrased it in his dissenting opinion in *Ash* v. *Swenson,* 397 U.S. 436, 463 (1969); "the concept of double jeopardy and our firm constitutional commitment is against repeated trials for *the same offense.*" (Emphasis the court's).

In its opinion below, the majority of the Illinois Supreme Court has held that Vitale was twice placed in jeopardy for the same offense because the traffic charge of failing to reduce speed to avoid an accident is a lesser included offense of the charge of involuntary manslaughter. This result, as noted in the dissenting opinion, is simply not correct. It is of course true that the conviction of the greater offense precludes conviction of a lesser included offense, or vice versa; *Brown* v. *Ohio,* 432 U.S. 161 (1977). In *Brown,* under Ohio law, the offense of joyriding was a lesser included offense of the charge of automobile theft; therefore, defendant could not be convicted of both. But in order to have a situation involving a lesser included of-

fense, it is necessary that proof of the greater offense necessarily include proof of the lesser. *Brown* v. *Ohio, supra.* Put another way, the lesser offense requires no proof which is not required in order to prove the greater. That the traffic offense is not a lesser included offense of the felony offense of involuntary manslaughter can be seen from the two Illinois Statutes involved. Involuntary manslaughter is defined by statute in Illinois thusly (Ill. Rev. Stat., 1975, Ch. 38, Sec. 9-3);

> "(a) A person who kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly.
>
> (b) If the acts which cause death consist of the driving of a motor vehicle, the person may be prosecuted for reckless homicide or if he is prosecuted for involuntary manslaughter, he may be found guilty of the included offense of reckless homicide."

Thus the Illinois Legislature had made reckless homicide a lesser included offense of involuntary manslaughter. But this has nothing to do with the instant case. It is clear that failure to reduce speed to avoid an accident is not a lesser included offense of involuntary manslaughter. The traffic charge is defined under Illinois Law as follows (Ill. Rev. Stat., 1973, Ch. 95½, Sec. 11-601(a));

> "No vehicle may be driven upon any highway of this State at a speed which is greater than is reasonable and proper with regard to traffic conditions or the use of the highway, or endangers the safety of any person or property. The fact that the speed of a vehicle does not exceed the applicable maximum speed limit does not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions. Speed must be decreased as may be necessary to avoid colliding with any person or vehicle on or entering the highway, in compliance with legal requirements and the duty of all persons to use due care."

Speaking for himself and Mr. Justice Ryan in the dissenting opinion in the Illinois Supreme Court below, Mr. Justice Underwood after analyzing these provisions concluded (Opinion, p. 8, Appendix A, p. A-__);

> ". . . Clearly, proof that one failed to reduce the speed of his vehicle to avoid a collision (the traffic offense) does not prove manslaughter, for the traffic offense need not involve death; equally clear is the fact that commission of the crime of involuntary manslaughter (the wardship charge) need not involve an unlawful failure to reduce speed or even the use of a car."

The fact that in this particular instance death resulted from failure to reduce speed is not relevent. Under the "same evidence test" the criterian is not that which was proven, but the elements which must be proven to meet the requirements of the several statutory provisions involved. If the so-called greater charge can be proven without including the lesser (or if the lesser includes an element not necessarily found in the so-called greater), then they are not of necessity included offenses and are not the same offense for the purposes of the Fifth Amendment. *Brown* v. *Ohio,* 432 U.S. 161 (1977); *People* v. *Hairston,* 46 Ill. 2d 348, 263 N.E. 2d 840 (1970), *Certiorari denied,* 402 U.S. 972 (1971). It is clear here that failure to reduce speed need involve no death or even collision with

a pedestrian, while involuntary manslaughter need involve no automobile or element of speed at all. Thus the two cannot be said to be included in any sense within each other. So, the Supreme Court of Ohio in a case not unlike that now before us held that a conviction for homicide by vehicle did not preclude conviction upon a traffic charge of driving at a greater speed than will permit the driver to stop within an assured-clear-distance. *State* v. *Best*, 42 Ohio St. 2d 530, 536, 330 N.E. 2d 421 (1975);

> "The only common element to the two offenses is that both involve the operation of a motor vehicle. No element of speed or distance ahead is involved in the offense of homicide by vehicle, and no element of causing death . . . is involved in the offense of failing to keep an assured-clear-distance. Although both offense arose out of the same transaction, they are separate and distinct offenses."

Here also, the statutory elements of the two offenses are different and it is this which makes them separate and distinct offenses for double jeopardy purposes. *Virgin Islands* v. *Smith*, 558 F.2d 691 (3rd Cir., 1977); *United States* v. *Cumberbatch*, 563 F. 2d 49 (2d Cir., 1977). There is, as we have noted, no constitutional prohibition either in federal or Illinois law against multiple prosecutions when an act or series of acts results in separate and distinct violations of the law. *People* v. *King*, 66 Ill. 2d 55, 362 N.E. 2d 352 (1977); *United States* v. *Crew*, 538 F. 2d 575 (4th Cir., 1976), *Certiorari denied*, 429 U.S. 852 (1976).

We submit that it is therefore clear that the traffic offense to which John Vitale pleaded guilty was not a lesser included offense of the charge of involuntary manslaughter, nor are the two offenses the same in law. Therefore, they are not the same offense for purposes of double jeopardy. The opinion of the majority of Illinois Supreme Court below is incorrect and should be set aside by this Court upon certiorari.

It should be noted here in passing that the opinion of the Illinois Appellate Court which preceeded that of the Supreme Court of Illinois dealt with the question in terms of compulsory joinder provisions of Illinois statutory law. However, this is not to say that the issue herein was in any way decided upon an independent state ground. On the contrary, it is evident that the majority opinion of the Supreme Court of Illinois did not touch upon this question and that this opinion, review of which is sought upon Writ of Certiorari, was decided squarely and purely upon the federal consitutional issue above. At the very most, reversal by this Court on certiorari might cause the Supreme Court of Illinois to examine the Illinois statutory question. But in no way can it be said that in its present posture this case is improperly being brought before the Supreme Court of the United States for consideration.

CONCLUSION

For these reasons, the Writ of Certiorari should be issued to review the judgment and opinion of the Supreme Court of the State of Illinois.

Respectfully submitted,

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APPENDICES

APPENDIX A

Docket No. 49326—Agenda 3—November 1977. *In re* JOHN M. VITALE, a Minor, Appellee.—(The People of the State of Illinois, Appellant.)

*MR. JUSTICE DOOLEY delivered the opinion of the court:

On November 20, 1974, an automobile operated by the minor respondent, John M. Vitale, struck two small children. One died almost immediately, and the other the following day. The investigating officer issued a traffic complaint charging respondent with failing to reduce speed to avoid an accident (Ill. Rev. Stat. 1973, ch. 95½, par. 11-601). On December 23, 1974, the traffic case was heard. Respondent pleaded guilty, was found guilty and was fined.

On the following day, December 24, 1974, a petition for adjudication of respondent's wardship was filed in the juvenile division of the circuit court of Cook County. The petition, signed by the same police officer who issued the traffic ticket, alleged respondent was delinquent in that on November 20, 1974, while recklessly driving an automobile, he committed involuntary manslaughter resulting in the death of the two minors.

Respondent subsequently moved to discharge, asserting the prosecution of the traffic charge barred the subsequent prosecution of the same offense under the compulsory joinder provision of the Criminal Code of 1961 (Ill. Rev. Stat.

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* This opinion was prepared by the late MR. JUSTICE DOOLEY and was adopted and filed as the opinion of the court.

1973, ch. 38, par. 3—3(b)), and the double jeopardy and due process clauses of the Federal Constitution. U. S. Const., Amends. V, XIV.

The circuit court dismissed the juvenile petition. The appellate court found that the involuntary manslaughter charge and failure to reduce speed charge were predicated on the same "act" within the meaning of section 3-3(b) of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par. 3—3(b))). Accordingly, it affirmed the dismissal order (44 Ill. App. 3d 1030). We granted leave to appeal under our Rule 315 (58 Ill. 2d R. 315).

Does the traffic offense for which respondent was tried and convicted, failure to reduce speed to avoid an accident, prohibit a subsequent prosecution for the manslaughter offenses? In our discussion of this broad issue we shall consider our Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par. 1—1 *et seq.*), as well as the double jeopardy clause of the Federal Constitution.

Section 3-3 of the Criminal Code of 1961 relating to joinder of offenses states:

> "(a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.
>
> (b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution, except as provided in Subsection (c), if they are based on the same act.
>
> (c) When 2 or more offenses are charged as required by Subsection (b), the court in the interest of justice may order that one or more of such charges shall be tried separately." (Ill. Rev. Stat. 1973, ch. 38, par. 3—3.)

So also section 3—4, having to do with the effect of a failure to comply with section 3—3, states:

> "(b) A prosecution is barred if the defendant was formerly prosecuted for a different offense, * * * if such former prosecution:
>
> (1) * * * was for an offense with which the defendant should have been charged on the former prosecution, as provided in Section 3—3 of this Code (unless the court ordered a separate trial of such charge) * * *." Ill. Rev. Stat. 1973, ch. 38, par. 3—4.

The appellate court employed as a basis for its decision the definitions of "act" and "conduct" in the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, pars. 2—2, 2—4). An "act" includes "a failure or omission to take action," and "conduct" is "an act or a series of acts, and the accompanying mental state." The appellate court concluded the acts in both the offense of failure to reduce speed and the offense of involuntary manslaughter were identical, with the exception that in the manslaughter offense a death was involved. Both offenses, it continued, were within the jurisdiction of a single court, the juvenile division of the circuit court of Cook County (Ill. Rev. Stat. 1973, ch. 37, par. 702—2).

The appellate court was likewise of the opinion that the State's Attorney's office had knowledge of the deaths when the traffic charge was prosecuted. Thus all the requirements of section 3—3(b) were met so as to bar subsequent prosecution.

We believe there is a more compelling reason why respondent cannot be prosecuted for the offense of involuntary manslaughter. The fifth amendment to the Constitution of the United States provides:

> "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." (U. S. Const., amend. V.)

The fifth amendment applies to the States through the due process clause of the fourteenth amendment. *Benton* v. *Maryland* (1969), 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056.

It is well established that certain constitutional protections are available to juveniles. (*In re Winship* (1970) 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068; *In re Gault* (1967), 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428.) Prosecuting a minor in special juvenile adjudicatory proceedings places him in jeopardy within the meaning of the fifth amendment. *Breed* v. *Jones* (1975), 421 U.S. 519, 44 L. Ed. 2d 346, 95 S. Ct. 1779.

The common law has long recognized double jeopardy. In referring to prior acquittal and prior conviction, Blackstone observed that this principle "is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense." 4 W. Blackstone, Commentaries *335. See also 3 E. Coke, Institutes 212-13 (1797); J. Sigler, Double Jeopardy: The Development of a Legal & Social Policy 2-16 (1969).

In determining whether multiple actions are prosecution for the same offense, the inquiry has historically been whether the same evidence will sustain the proof of each offense. *Gavieres* v. *United States* (1911), 220 U.S. 338, 342, 55 L. Ed. 489, 490, 31 S. Ct. 421, 422.

In the recent case of *Brown* v. *Ohio* (1977), 432 U.S. 161, 53 L. Ed. 2d 187, 97 S. Ct. 2221, prosecution and punishment for joyriding—taking an automobile without the owner's permission—prohibited prosecution and punishment for automobile theft, an offense which required proof of intent on the part of the thief to permanently deprive the owner of possession. We are told:

> "The Double Jeopardy Clause of the Fifth Amendment, applicable to States through the Fourteenth, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb. *It has long been understood that separate statutory crimes need not be identical—either in constituent elements or in actual proof—in order to be the same within the meaning of the constitutional prohibition.* 1 J. Bishop, New Criminal Law sec. 1051 (8th ed. 1892); Comment, Twice in Jeopardy, 75 Yale L. J. 262, 268-269 (1965). The principal question in this case is whether auto theft and joyriding, a greater and lesser included offense under Ohio law, constitute the 'same offense' under the Double Jeopardy Clause." (Emphasis added.) 432 U.S. 161, 164, 53 L. Ed. 2d 187, 193, 97 S. Ct. 2221, 2224-25.

So here the two separate statutory offenses of failing to reduce speed and involuntary manslaughter need not be identical, either in their basic ingredients or in their proof to be the "same" within the double jeopardy clause.

Any lesser offense is included in the greater offense for the purpose of double jeopardy. This was pronounced as long ago as 1889 in *In re Nielsen* (1889), 131 U.S. 176, 33 L. Ed. 118, 9 S. Ct. 672, where it was observed:

> "[W]here * * * a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." 131 U.S. 176, 188, 33 L. Ed. 118, 122, 9 S. Ct. 672, 676.

Brown v. *Ohio* (1977), 432 U.S. 161, 53, L. Ed. 2d 187, 97 S. Ct. 2221, exemplifies the meaning of the test to de-

termine whether the two offenses are the same. Joyriding was a lesser included offense in automobile theft. The State, to prove theft, had to establish joyriding plus the requisite intent of the thief to permanently deprive the owner of possession. Nevertheless, the prior prosecution for joyriding barred prosecution for automobile theft.

Here it becomes important to examine the statutory definition of the crimes of involuntary manslaughter and failure to reduce speed.

Involuntary manslaughter was defined by statute at the time of the occurrence thus:

> "(a) A person who kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly.
>
> (b) If the acts which cause the death consist of the driving of a motor vehicle, the person may be prosecuted for reckless homicide or if he is prosecuted for involuntary manslaughter, he may be found guilty of the included offense of reckless homicide.
>
> (c) Sentence.
>
> (1) Involuntary manslaughter is a Class 3 felony.
>
> (2) Reckless homicide is a Class 4 felony." Ill. Rev. Stat. 1973, ch. 38, par. 9—3.

The issues in reckless homicide are: Did the defendant cause death by driving a motor vehicle? Did the defendant drive the motor vehicle recklessly? Did the defendant drive the motor vehicle in a manner likely to cause death or great bodily harm? Each of these has to be proved beyond a reasonable doubt. Illinois Pattern Jury Instructions, Criminal, No. 7.10 (1968).

Failure to reduce speed to avoid an accident is defined by statute as follows:

> "(a) No vehicle may be driven upon any highway of this State at a speed which is greater than is reasonable and proper with regard to traffic conditions and the use of the highway, or endangers the safety of any person or property. The fact that the speed of a vehicle does not exceed the applicable maximum speed limit does not not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions. *Speed must be decreased as may be necessary to avoid colliding with any person or vehicle on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.*" (Emphasis added.) Ill. Rev. Stat. 1973, ch. 95½, par. 11—601(a).

The statute imposes the duty upon all motorists to exercise ordinary care, to reduce speed, and to avoid colliding with "any person."

To prove the charge of failing to reduce speed, the State has to prove that the defendant drove carelessly and failed to reduce speed to avoid colliding with a person. Involuntary manslaughter with a motor vehicle, or reckless homicide, is a reckless operation of a motor vehicle in a manner likely to cause death or great bodily harm (Ill. Rev. Stat. 1973, ch. 38, par. 9—3). "Recklessness" does not require an intent to kill. (See *People* v. *Parr* (1976), 35 Ill. App. 3d 539, 542; *People* v. *Bembroy* (1972), 4 Ill. App. 3d 522, 525.) It is a species of violation of duty. Ill. Rev. Stat. 1973, ch. 38, par. 4—6; *People* v. *Potter* (1955), 5 Ill. 2d 365, 368.

As is usually the situation between greater and lesser included offenses, the lesser offense, failing to reduce speed, requires no proof beyond that which is necessary for conviction of the greater, involuntary manslaughter. Accordingly, for purposes of the double jeopardy clause, the greater offense is by definition the "same" as the lesser offense included within it.

Failing to reduce speed and involuntary manslaughter cannot be fragmented so as to create different offenses. "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Brown* v. *Ohio* (1977), 432 U.S. 161, 169, 53 L. Ed. 2d 187, 196, 97 S. Ct. 2221, 2227.

The sequence of the prosecution is immaterial. The conviction of the lesser precludes conviction of the greater, just as conviction of the greater precludes conviction of the lesser. (*Brown* v. *Ohio* (1977), 432 U.S. 161, 53 L. Ed. 2d 187, 97 S. Ct. 2221; *In re Nielsen* (1889), 131 U.S. 176, 33 L. Ed. 118, 9 S. Ct. 672.) Here it is irrelevant of what offense, failing to reduce speed or involuntary manslaughter, respondent was first convicted.

Both offenses were against the same sovereign, the State of Illinois. The traffic court, as well as the juvenile court, were courts of this same sovereign. (See *Waller* v. *Florida* (1970), 397 U.S. 387, 25 L. Ed. 2d 435, 90 S. Ct. 1184; *People* v. *Gray* (1977), 69 Ill. 2d 44.) The trial and conviction in the traffic court barred subsequent action in the juvenile court of Cook County. The State could not place respondent on trial twice for the "same offense."

Double jeopardy is a constitutional guarantee. It is a matter which cannot be left for State court determination. (*Ashe* v. *Swenson* (1970), 397 U.S. 436, 442-43, 25 L. Ed.

2d 469, 475, 90 S. Ct. 1189, 1194.) State legislatures are free to define crimes and fix punishments. Once the legislature has acted, however, the courts are prohibited by the due process and double jeopardy clauses from imposing more than one punishment for the same offense. *Brown* v. *Ohio* (1977), 432 U.S. 161, 165, L. Ed. 2d 187, 193, 97 S. Ct. 2221, 2225.

For the reasons herein expressed, under the double jeopardy clause the conviction on the traffic charge of failure to reduce speed precluded the prosecution in a separate action for involuntary manslaughter.

Judgment affirmed.

MR. JUSTICE UNDERWOOD, dissenting:

I have inflicted this lengthy dissent upon the reader because I believe the majority of this court has substantially broadened the double jeopardy rule it purports to follow, reaching a result which is compelled by neither the Federal Constitution nor the constitution or statutes of Illinois.

Brown v. *Ohio* (1977), 432 U.S. 161, 53 L. Ed. 2d 187, 97 S. Ct. 2221, relied on by the majority, does not require the dismissal of the involuntary manslaughter charge levied against Vitale. In *Brown*, the defendant was first convicted of joyriding and later convicted of auto theft. The Ohio court conceded that, under the applicable Ohio statute, joyriding was completely included within the offense of auto theft. On that basis the Supreme Court reversed the subsequent conviction, holding that an included offense is the same offense for the purpose of applying the protections of the double jeopardy clause. That holding is inapplicable here because under the lesser included offense test also found in the *Brown* opinion, the offense of failing to reduce speed to avoid an accident is not encompassed by the offense of involuntary manslaughter.

This court recently considered whether subsequent prosecutions for aggravated battery and attempted murder were constitutionally impermissible where there had been a prior finding and punishment for indirect contempt of court based upon the identical conduct. In *People* v. *Gray* (1977), 69 Ill. 2d 44, with the author of this opinion specially concurring and Mr. Justice Ryan dissenting, the court held the subsequent prosecutions precluded. We there said, "To determine whether two actions are prosecutions for the same offense, the test is: Would the same evidence sustain the proof of each offense?" In a similar vein we quoted from the opinion of the Supreme Court in *Brown* v. *Ohio* (1977), 432 U.S. 161, 166, 53 L. Ed. 2d 187, 194, 97 S. Ct. 2221, 2225.

> "Mr. Justice Powell, speaking for the court in holding that prosecution and punishment for auto theft prohibited prosecution and punishment for joyriding, had occasion to restate the controlling principles which bar successive prosecutions as well as consecutive sentences at a single trial:
>
> 'The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger* v. *United States,* 284 U.S. 299, 304 (1932):
>
> "The applicable rule is that where the same act of transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. * * *"
>
> This test emphasizes the elements of the two crimes. "If each requires proof that the other does not, the *Blockburger* test would be satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.' * * *" *Iannelli* v. *United States,* 420 U.S. 770 785 n.17 (1975).
>
> * * *' [Citation.]" 69 Ill. 2d 44, 49-50.

It was also noted that *Brown* held "conviction of a lesser included offense barred prosecution for a greater offense, * * * since the lesser offense required no proof beyond that required for the conviction of the greater offense." (69 Ill. 2d 44, 51.) It is precisely the fact that each of the charges here "requires proof of a fact which the other does not," and that proof of the greater offense does not necessarily involve proof of the lesser, which distinguishes This case from *Brown* and *Gray.* Clearly, proof that one failed to reduce the speed of his vehicle to avoid a collision (the traffic offense) does not prove manslaughter, for the traffic offense need not involve death; equally clear is the fact that commission of the crime of involuntary manslaughter (the wardship charge) need not involve an unlawful failure to reduce speed or even the use of a car. In short the traffic violation was not a lesser included offense of the manslaughter charges upon which the wardship proceedings are predicated, and therefore the latter do not fall within the admonition of *Brown* that "Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." (432 U.S. 161, 169, 53 L. Ed. 2d 187, 196, 97 S. Ct. 2221, 2227.) The majority's conclusion that "the lesser offense, failing to reduce speed, requires no proof beyond that which is necessary for conviction of the greater, involuntary manslaughter" (slip op. at 5) is, of course, simply not correct, for, as above stated, proof of manslaughter need not involve a car at all.

Under the "same evidence" test, the fact that similar evidence is in fact introduced in both trials is irrelevant. If the greater offense can be accomplished without committing the lesser offense, then the greater offense does not embrace the lesser, notwithstanding that in the particular case the same facts give rise to both offenses. "As is *in-*

variably true of a greater and lesser included offense, the lesser offense * * * requires no proof beyond that which is required for conviction of the greater * * *." (Emphasis added.) (*Brown* v. *Ohio* (1977), 432 U.S. 161, 168, 53 L. Ed. 2d 187, 195-96, 97 S. Ct. 2221, 2226.) The crucial evidence is not that actually presented, but the evidence required by the applicable statutes. Our opinions make plain that Illinois has heretofore been among the majority of jurisdictions applying this test in determining what are included offenses. In *People* v. *Hairston* (1970) 46 Ill. 2d 348, 358, this court quoted *Gavieres* v. *United States* (1911), 220 U.S. 338, 342, 55 L. Ed. 489, 490, 31 S. Ct. 421, 422, also relied upon in *Gray*, as follows:

> "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same *act*, but whether he has been put in jeopardy for the same *offense*. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." (Emphasis added.)

This court went on to note:

> "Along the same lines, it has been frequently manifested that offenses are not the same if, upon trial of one, proof of an additional fact is required which is not necessary to be proved in the trial of the other, although the same acts may be necessary to be proved in the trial of each. *Ebeling* v. *Morgan* (1915), 237 U.S. 625, 59 L. Ed. 1151, 35 S. Ct. 710; *Blockburger* v. *United States* (1932), 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180; *Gore* v. *United States* (1958), 357 U.S. 386, 2 L. Ed 2d 1405, 78 S. Ct. 1280; *Hattaway* v. *United States* (5th Cir. 1968), 399 F.2d 431; *People* v. *Garman*, 411 Ill. 279." (46 Ill. 2d 348, 358-59.)

In *People* v. *Glickman* (1941), 377 Ill. 360, defendant was charged with burglary under the applicable statute, which did not contain the common law requirement of entering at night. Defendant was convicted of attempted burglary under a statute which did require that the attempt be made at night. In support of this conviction, the State argued that attempt was a lesser offense included within burglary, but this court reversed the conviction holding that "the greater crime, burglary, does not contain all of the elements of the lesser, for the element 'in the nighttime' is absent" (377 Ill. 360, 367), although defendant's activity was in fact shown to be at night. See also *People* v. *King* (1966), 34 Ill. 2d 199; *People* v. *Higgins* (1967), 86 Ill. App. 2d 202; *People* v. *Shoemaker* (1975), 31 Ill. App. 3d 724.

Following *Glickman*, the legislature defined an included offense in section 2—9 of the Criminal Code:

> "Included offense" means an offense which
>
> (a) Is established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged, or
>
> (b) Consists of an attempt to commit the offense charged or an offense included therein." (Ill. Rev. Stat. 1975, ch. 38, par. 2—9.)

It thereby incorporated the "same evidence" test (see *People* v. *Baylor* (1975), 25 Ill. App. 3d 1070, 1074), which is applied although the facts presented in the particular case actually prove the lesser offense. See *People* v. *Yanders* (1975), 32 Ill. App. 3d 599.

The essence of the "same evidence" or "required evidence" test of *Blockburger* v. *United States* (1932), 284 U.S. 299, 304, 76 L. Ed. 306, 309, 52 S. Ct. 180, 183 is "whether each provision requires proof of an additional fact which the other does not." This test, utilized by a majority of American jurisdictions, has been restated by various American courts. In Comment, *Twice in Jeopardy*, 75 Yale L.J. 262 (1965), the author noed these reformulations of the test: (1) the "backwards" test—offenses are not the same unless defendant could have been convicted of the second offense on the evidence needed in the first trial; (2) the "distinct elements" test—"offenses are not the same if each contains an element not included in the other"; (3) the "identity" test—"offenses are the same for double jeopardy purposes only if they are identical in law and fact." (75 Yale L.J. 262, 273.) The Supreme Court of Iowa, in holding that a reckless driving conviction did not bar a subsequent prosecution for manslaughter, stated: "The lesser offense must be composed solely of some but not all elements of the greater crime. The lesser crime must not require any additional element which is not needed to constitute the greater crime. The lesser offense is therefore said to be *necessarily* included within the greater." (*State* v. *Stewart* (Iowa 1974), 223 N.W. 2d 250, 252, *cert. denied* (1975), 423 U.S. 902, 46 L. Ed 2d 134, 96 S. Ct. 205.)

The Supreme Court of Ohio in *State* v. *Best* (1975), 42 Ohio St. 2d 530, 330 N.E. 2d 421, a case very similar to our own, held that the charge of driving a vehicle "at a greater speed than will permit him [the driver] to bring it to a stop within the assured-clear-distance" (42 Ohio St. 2d 530, 536, 330 N.E. 2d 421, 425) is not barred by a prior prosecution for homicide by vehicle because it is not a lesser

included offense. The court found that the misdemeanor bore no relationship to the offense of homicide by vehicle, stating:

> "The only common element to the two offenses is that both involve the operation of a motor vehicle. No element of speed or distance ahead is involved in the offense of homicide by vehicle, and no element of causing death or of violation of the specific statutes cited in [the homicide statute] is involved in the offense of failing to keep an assured-clear-distance ahead. Although both offenses arose out of the same transaction, they are separate and distinct offenses." 42 Ohio St. 2d 530, 536, 330 N.E. 2d 421, 425.

In the recent, post-*Brown* case of *Virgin Islands* v. *Smith* (3d Cir. 1977), 558 F. 2d 691, the court of appeals acknowledged that *Brown* followed the *Blockburger* rule, which says that it is the evidence demanded by the definition of the offense, not the evidence adduced at trial, which determines the inclusion of one offense within another. In *Smith*, the defendant asserted that a prior conviction of possession of a dangerous weapon barred prosecution for a murder committed with that weapon. The court disagreed, stating:

> "The Supreme Court made its position clear in *Iannelli* v. *United States*, 420 U.S. 770, 785 n. 17, 95 S. Ct. 1284, 1294, 43 L. Ed. 2d 616 (1975), where it said:
>
> '[T]he Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'

See also *Brown* v. *Ohio*, supra.

Viewing the criminal activity here against that backdrop reveals the weakness of defendant's position. Al-

> though a dangerous weapon may be used to commit a murder, a victim can be killed without the use of any weapon, for example, by strangulation. Moreover, it would be possible for a person to possess a knife in violation of the weapons statute, but in stabbing a person in self-defense be innocent of murder. Thus, a verdict of guilty on either charge would not establish the legal prerequisites for the other." 558 F. 2d 691, 696.

Similarly, in *United States* v. *Cumberbatch* (2d Cir. 1977), 563 F. 2d 49, the court cited *Brown* in holding that the offense of carrying a firearm unlawfully during the commission of a felony is not included in the offense of bank robbery with the use of a dangerous weapon, and that conspiracy to commit bank robbery is not included in the offense of bank robbery. For other cases holding this weapons offense not included in armed robbery see *Coates* v. *Maryland* (1977), 436 F. Supp. 226, also citing *Brown*, and *United States* v. *Crew* (4th Cir. 1976), 538 F. 2d 575, *cert. denied* (1976), 429 U. S. 852, 50 L. Ed. 2d 127, 97 S. Ct. 144.

Brown's reiteration of the "same evidence" test of *Blockburger* evinces once again the Supreme Court's consistent refusal to adopt the continuing arguments of some of its members for "episodic immunity" or a "same transaction" test which would generally require the joinder in one proceeding of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." (*Ashe* v. *Swenson* (1970), 397 U.S. 436, 453-54, 25 L. Ed. 2d 469, 481, 90 S. Ct. 1189, 1199; *Brown* v. *Ohio* (1977), 432 U.S. 161, 170, 53 L. Ed. 2d 187, 197, 97 S. Ct. 2221, (Brennan & Marshall, J.J., concurring).) (See collection of dissents cited in *Thompson* v. *Oklahoma* (1977), 429 U.S. 1053, 1054, 50 L. Ed. 2d 770, 97 S. Ct. 768 (Brennan & Marshall, J.J., dissenting from denial of

certiorari).) Nor, until now, has this court construed our constitution or statutes as incorporating a "same transaction" test. *People* v. *Hairston* (1970), 46 Ill. 2d 348, 358; *People* v. *Allen* (1937), 368 Ill. 368, 379.

Directly in point is our recent clarification in *People* v. *King* (1977), 66 Ill. 2d 551, of the confusion resulting from earlier opinions considering the multiple prosecution and sentencing questions. We there undertook a comprehensive discussion of the constitutional and statutory issues involved, concluding:

> "[W]e are aware of no constitutional limitations against multiple convictions and concurrent sentences for differet offenses arising from multiple acts which are incidental to or motivated by some greater criminal objective. Multiple convictions and *consecutive* sentences have been permitted against claims of double jeopardy for offenses based on a single act but requiring proof of different facts. *Gore* v. *United States* (1958), 357 U.S. 386, 2 L. Ed. 2d 1405, 78 S. Ct. 1280; *Blockburger* v. *United States* (1932), 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180." (66 Ill. 2d 551, 565.)

Even more precisely in point, perhaps, is the following:

> "Prejudice, with regard to multiple acts, exists only when the defendant is convicted of more than one offense, some of which are, by definition, lesser included offenses. Multiple convictions and concurrent sentences should be permitted in all other cases where a defendant has committed several acts, despite the interrelationship of those acts. "Act," when used in this sense, is intended to mean any overt or outward manifestation which will support a different offense. We hold, therefore, that when more than one offense arises from a series of incidental or closely related acts and the offenses are not, by definition, lesser included offenses, convictions with concurrent sentences can be entered." 66 Ill. 2d 551, 566.

The lesser included offense doctrine evolved at common law as an aid to the prosecution when it failed to prove all the elements necessary for a guilty verdict on the crime charged in the indictment. (*People* v. *Mussenden* (1955), 308 N.Y. 558, 562, 127 N.E. 2d 551, 553; *United States* v. *Harary* (2d Cir. 1972), 457 F. 2d 471, 478.) A strict adherence to the "same evidence" standard protects defendants from too broad an application of this doctrine and a resultant conviction of an offense not charged. (*People* v. *Glickman* (1941), 377 Ill. 360; *People* v. *Rainbolt* (1977), 52 Ill. App. 3d 374 (criminal trespass to vehicle not a lesser offense included in charge of theft of a vehicle, conviction of criminal trespass to vehicle on theft indictment reversed); *People* v. *Yanders* (1975), 32 Ill. App. 3d 599 (theft not less offense included in robbery, theft conviction on basis of robbery indictment reversed); *People* v. *Shoemaker* (1975), 31 Ill. App. 3d 724 (burglary indictment will not support theft conviction since proof of burglary need not include all essential elements of theft); *People* v. *Higgins* (1967), 86 Ill. App. 2d 202 (aggravated battery not included within involuntary manslaughter, conviction of aggravated battery on involuntary manslaughter charge reversed).) In my opinoin, a charge of involuntary manslaughter, as here, would not support a conviction for failing to reduce speed. In its desire to protect this defendant, the majority has eroded the important protections offered other defendants by the "same evidence" doctrine.

Nor do the compulsory joinder provisions of the Criminal Code relied on by the appellate court apply to the charges made against Vitale. It is clear that section 3—3(b) requires joinder of the traffic charge and the manslaughter charge if both arose from the "same act," and that in such circumstances section 3—4(b)(1) would effectively bar a separate prosecution of the manslaughter charges subsequent to conviction on the traffic charge unless separate trials had been ordered by the trial court pursuant to section 3—3(c). If, however, the charges are not based on the same act, they need not be joined in a single prosecution, and conviction of the traffic violation does not preclude subsequent prosecution of the manslaughter charges. See Ill. Ann. Stat., ch. 38, par. 3—3, Committee Comments, at 202 (Smith-Hurd 1972).

The appellate court found that the involuntary manslaughter charge and the charge of failure to reduce speed to avoid an accident were both based on the "act" of driving a motor vehicle in a manner likely to cause a collision, with such act resulting in collision. The specific act for which Vitale was convicted in traffic court was his failure to decrease his speed to avoid colliding with the pedestrians. (Ill. Rev. Stat. 1973, ch. 95½, par. 11—601(a).) In some circumstances such an act may also be sufficient, should there be a resultant death, to support an involuntary manslaughter or reckless homicide prosecution, since this act may have been performed recklessly and was "likely to cause death or great bodily harm to some individual." (Ill. Rev. Stat. 1973, ch. 38, par. 9—3(a).) However, there is no showing here that the manslaughter rests solely or even principally upon the failure to reduce speed.

The police report of the accident, contained in the record before us, states that Vitale struck and killed two 5-year-old children who were crossing the street in a marked school crosswalk under the direction of a uniformed crossing guard displaying a stop sign in the center of the street. According to the report, Vitale stated that his attention was diverted to his left and when he looked back it was too late to stop. The investigating officer was of the opinion that the skid marks indicated that defendant was traveling

at a speed in excess of 50 miles per hour. The accident occurred in a zone normally limited to 35 miles per hour, but in which a 20 miles per hour school speed limit was in effect. The police report states that there were seven official speed warning signs within 1¾ blocks of the crosswalk. In addition, the report indicates that three of the vehicle's four brakes tested out as faulty.

The petition for wardship may have been based on Vitale's acts in permitting his attention to be diverted while driving at a high rate of speed, failing to appropriately maintain the vehicle's braking system, failing to note the seven school zone and speed warning signs, initially raising the speed of his auto to a dangerous level, or by disobeying the commands of the crossing guard. While we do not now know which of that series of acts the State intended to rely on at trial, one certainly cannot now say that it would rely solely upon Vitale's failure to reduce speed to the exclusion of his other misconduct.

In *People* v. *Griffin* (1967), 36 Ill. 2d 430, the State charged defendant with reckless driving, but the court found the information which the State filed in that case so imprecise that the defendant would not be able to plead a judgment thereon as a bar to a future prosecution arising from the same facts. The particular act or acts which constituted reckless driving may have been any one of a number acts, such as "driving while intoxicated, or running through a stop-light, or driving at an excessive speed or without brakes, lights or horn; he may have been driving on the wrong side of the road or on the sidewalk, or without keeping proper lookout for children, or any one of dozens of things which might constitute willful and wanton disregard for the safety of persons or property." 36 Ill. 2d 430, 432, citing *People* v. *Green* (1938), 368 Ill. 242, 254-55. The importance of *Griffin* here is the court's discussion of the statutory compulsory joinder protections:

> "It does not appear that the compulsory joinder provision of the Criminal Code (Ill. Rev. Stat. 1965, chap. 38, par. 3—3,) would protect him against subsequent prosecution for each of the specific [traffic] offenses. Section 3—3 requires that offenses be prosecuted together only 'if they are based on the same act.' The comments of the drafting committee make it clear that this provision was not meant to require joinder of separate offenses resulting from the same 'conduct' (Committee Comment, S.H.A. chap 38, par. 3—3,) which is defined as 'an act or a series of acts.' (Ill. Rev. Stat. 1965, chap. 38, par. 2—4.) Since each act in the example stated would be a separate offense, and might, in appropriate circumstances, constitute reckless driving, the compulsory joinder provision would not prevent successive prosecutions for reckless driving and for each of the other violations." 36 Ill. 2d 430, 433-34.

The committee comments to this section state that "Section 3—3 is not intended to cover the situation in which several offenses—either repeated violations of the same statutory provision or violations of different provisions—arise from a series of acts which are closely related with respect to the offender's single purpose or plan." (Ill. Ann. Stat., ch. 38, par. 3—3, Committee Comments, at 202 (Smith-Hurd 1972).) Of course, involuntary manslaughter is a "nonintent" offense, and the minor here had no "purpose or plan," but his conduct did involve multiple offenses—violations of different statutes arising from a series of acts contributing to the result with which he is now being charged.

It is clear that section 3—3 cannot be applied to bar the wardship proceedings here, where the State may seek to prove the homicide allegations by showing any or all of a number of different acts by respondent to be reckless and like to cause death or great bodily harm.

By its opinion the majority has adopted, *sub silentio,* the "episodic immunity" or "same transaction" test unsuccessfully urged by the minority in the United States Supreme Court in *Ashe* and *Brown,* and rejected by both this court and our General Assembly, as earlier noted. In accomplishing this result both the Federal constitution and Federal case law are misinterpreted. If my colleagues feel compelled to expand the protections of the double jeopardy clause, I would have thought it preferable to do so by enlarging the prior interpretations of article 1, section 10, of our own constitution instead of misapplying Federal constitutional provisions. By choosing the latter course the majority has muddied what have been reasonably clear waters.

While I find no bar to prosecution of this wardship proceeding, I would call attention to the sentiments in *United States* v. *Wilson* (1975), 420 U.S. 332, 343, 43 L. 1d. 2d 232, 241, 95 S. Ct. 1013, 1021. Generally speaking, considerations of fairness and finality, as well as judicial efficiency and economy, would seem to indicate the undesirability, even though permissible, of successive prosecutions for offenses arising from the same "episode" or "transaction." This philosophy might well guide the exercise of prosecutorial discretion, but the difficulty of an absolute rule is amply demonstrated by the majority holding here which permits a defendant who has caused two deaths to escape punishment other than a nominal fine.

I would reverse the judgments of the appellate and circuit courts and remand to the circuit court of Cook County for further proceedings.

MR. JUSTICE RYAN joins in this dissent.

APPENDIX B

No. 62870

IN THE INTEREST OF: JOHN M. VITALE, a minor. PEOPLE OF THE STATE OF ILLINOIS, *Petitioner-Appellant,* vs. JOHN M. VITALE, a minor, *Respondent-Appellee.*	Appeal from the Circuit Court of Cook County, Juvenile Division. Honorable Joseph C. Mooney, Judge Presiding.

MR. JUSTICE McGLOON delivered the opinion of the court:

Respondent, John Vitale, was charged, tried and convicted by the circuit court of Cook County, in South Holland, Illinois, of the offense of failing to reduce speed to avoid an accident, in violation of section 11-601 of the Illinois Vehicle Code. (Ill. Rev. Stat. 1973, ch. 95½, par. 11-601.) Subsequently, a petition for adjudication of respondent's wardship was filed in the juvenile division of the circuit court of Cook County, alleging that respondent was delinquent because he committed involuntary manslaughter arising from his reckless misconduct in the operation of a motor vehicle which resulted in the deaths of two children. Respondent moved for discharge of the juvenile petition, arguing that the latter prosecution was barred by both the constitutional rules against double jeopardy and the statutory provisions contained in section 3-4 of

the Criminal Code. (Ill. Rev. Stat. 1973, ch. 38, par. 3-4.) The circuit court dismissed the juvenile petition, and the State appeals.

We affirm.

The pleadings disclose the following pertinent facts. On November 20, 1974, the car respondent was operating struck two small children; one child died almost immediately and the other died the next day. The investigating officer of the South Holland Police Department issued a traffic complaint and summons to respondent, charging him with failing to reduce speed to avoid an accident. (Ill. Rev. Stat. 1973, ch. 95½, par. 11-601.) The traffic case was heard at a bench trial on December 23, 1974. Vitale pleaded not guilty, was found guilty, and a fine was assessed against him. The records from the traffic case, unfortunately, are not before us. On the next day, December 24, 1974, a petition for the adjudication of John Vitale's wardship was filed in the juvenile division of the circuit court of Cook County. The petition alleged that respondent was delinquent because he committed two offenses of involuntary manslaughter on November 20 while recklessly driving a motor vehicle. The petition was signed by the same policeman who initiated the traffic proceeding. Respondent subsequently moved for discharge of the juvenile petition because he had already been tried for an offense arising from the November 20 incident, so that the latter prosecution was barred by sections 3-3 and 3-4 of the Criminal Code. Ill. Rev. Stat. 1973, ch. 38, pars. 3-3 and 3-4.

Section 3-3 of the Criminal Code states:

> "(a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.
>
> (b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution, except as provided in Subsection (c), if they are based on the same act.
>
> (c) When 2 or more offenses are charged as required by Subsection (b), the court in the interest of justice may order that one or more of such charges be tried separately."

Section 3-4 provides the effect of a failure to comply with section 3-3:

> "* * * (b) A prosecution is barred if the defendant was formerly prosecuted for a different offense, * * * if such former prosecution:
>
> (1) * * * was for an offense with which the defendant should have been charged on the former prosecution, as provided in Section 3-3 of this Code (unless the court ordered a separate trial of such charge) * * *."

Ill. Rev. Stat. 1973, ch. 38, pars. 3-3 and 3-4.

This appeal presents three questions under section 3-3: (1) Whether the offense of failing to reduce speed to avoid an accident was based on the same act as the offenses of involuntary manslaughter; (2) Whether the traffice offense and the involuntary manslaughter offenses were within the jurisdiction of a single court; and (3) Whether the involuntary manslaughter offenses were know to the proper prosecuting officer when the traffic charge was prosecuted.

The first issue is whether the traffic offense for which respondent was convicted in traffic court, failing to reduce speed to avoid an accident (hereinafter FTRS), arose from the same act as the involuntary manslaughter offenses. The State argues that the offense of FTRS is not a lesser included offense of involuntary manslaughter, and that the

offenses are separate and distinct in law and fact. The respondent argues that the traffic offense is a lesser included offense of involuntary manslaughter, and all the offenses arose from and are based on the same act.

The offense of involuntary manslaughter is defined as follows:

> "(a) A person who kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly.
>
> (b) If the acts which cause the death consist of the driving of a motor vehicle, the person may be prosecuted for reckless homicide or if he is prosecuted for involuntary manslaughter, he may be found guilty of the included offense of reckless homicide.
>
> (c) Sentence.
>
> (1) Involuntary manslaughter is a Class 3 felony.
>
> (2) Reckless homicide is a Class 4 felony."

(Ill. Rev. Stat. 1973, ch. 38, par. 9-3.) Under the statute in effect at the time of the conduct in question, reckless homicide was a lesser included offense of involuntary manslaughter. (*People* v. *Gibson* (1976), __ Ill. App. 3d __, 354 N.E. 2d 71.) Because reckless homicide and FTRS have the same common denominator, the use of a motor vehicle, we shall compare these offenses to determine whether FTRS and reckless homicide, and therefore involuntary manslaughter, are based upon the same act.

The elements of reckless homicide are: (1) that the defendant caused the victim's death by driving a motor vehicle; (2) that the defendant drove the motor vehicle recklessly; and (3) that the defendant drove the motor

vehicle in a manner likely to cause death or great bodily harm. (Illinois Pattern Jury Instructions, Criminal, No. 7.10) Although not stated in as many words, a collision with a person or property is an element of proof because the death in such a case would always result from such a collision. As was stated in *People* v. *Crego* (1946), 395 Ill. 451, 461-62:

> "Before a verdict of guilty in an automobile manslaughter case can be sustained the proof must disclose that defendant knew of the danger of collision and reckless, * * * ran down and collided with the deceased without using such means as were reasonable and at his command to prevent the accident."

The offense of failing to reduce speed to avoid an accident is set forth in section 11-601(a) of the Illinois Vehicle Code:

> "(a) No vehicle may be driven upon any highway of this State at a speed which is greater than is reasonable and proper with regard to traffic conditions and the use of the highway, or endangers the safety of any person or property. The fact that the speed of a vehicle does not exceed the applicable maximum speed limit does not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions. *Speed must be decreased as may be necessary to avoid colliding with any person or vehicle on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.*"

(Ill. Rev. Stat. 1973, ch. 95½, par. 11-601(a), emphasis added.) The first element is that the defendant, while driving a motor vehicle, collided with a person or vehicle. The

second element of the offense as written is that the defendant drove the motor vehicle in a manner which was in violation of his duty to exercise due care. The final element is that the collision was caused by defendant's failure to reduce his vehicle's speed in violation of his duty of due care. The penalty provision is that the first and second convictions for this offense are Class C misdemeanors (Ill. Rev. Stat. 1973, ch. 95½, par. 16-104), punishable by not more than 30 days imprisonment (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-3(3)), and a fine not to exceed $500. Ill. Rev. Stat. 1973, ch. 38, par. 1005-9-1(3).

The State argues that the respondent's act of FTRS causing a collision with two persons was independent of and had no necessary or consequential relationship with the acts which would constitute respondent's culpability of the offense of involuntary manslaughter. We believe that the appropriate law is contained within our Criminal Code, which defines "act" to include "a failure or omission to take action," and defines "conduct" as "an act or a series of acts and the accompanying mental state." (Ill. Rev. Stat. 1973, ch. 38, pars. 2-2 and 2-4.) As applied to the instant facts, these definitions lead us to the following conclusions. The *conduct* constituting the offense of involuntary manslaughter with a motor vehicle, or reckless homicide, is the *act* of driving a motor vehicle in a manner likely to cause a collision resulting in death, with the resulting collision and death, accompanied by the mental state of recklessness. The act constituting the offense of FTRS is the *act* of driving a motor vehicle and *failing* to reduce its speed to avoid a collision, with such failure resulting in a collision. Since an act includes a failure or omission, the offence of FTRS is the *act* of driving a motor vehicle in a manner likely to cause a collision, with such act resulting in a collision. Comparing the acts in

both offenses, the major difference is in the death required for involuntary manslaughter. The basic acts of both offenses are identical. We hold that the attempted prosecution herein for the two offenses of involuntary manslaughter was based upon the same act as the former prosecution for the offense of failing to reduce speed.

The second issue arising under sectoin 3-3 is whether the traffice offense of FTRS and the involuntory manslaughter offenses were within the jurisdiction of a single court. The Juvenile court has original and exclusive jurisdiction over a minor who is delinquent by reason of the violation of "any federal or state law or municipal ordinance" (Ill. Rev. Stat. 1973, ch. 37, par. 702-2; *In re Rahn* (1974), 59 Ill. 2d 302, 319 N.E. 2d 787), except that a minor alleged to have committed a traffic offense may be prosecuted therefor without reference to the procedures of the Juvenile Court Act (Ill. Rev. Stat. 1973, ch. 37, par. 702-7(2).) In the case at bar, jurisdiction over the minor for commission of the traffic offense of FTRS was properly exercised by the circuit court sitting in South Holland without regard for the requirements of the Juvenile Court Act, although the juvenile court also had jurisdiction over the minor for the same offense. The offenses of FTRS and involuntary manslaughter were all within the jurisdiction of a single court, the juvenile division of the circuti court of Cook County.

The third issue is whether the involuntary manslaughter offenses were known to the proper prosecuting officer when the traffic charge was prosecuted. At the June 9, 1975 hearing on respondent's motion, the trial court specifically asked the two assistant State's Attorneys in court whether the manslaughter charges were known to the State's Attorney's office when the traffic offense was heard on December 23, 1974. In response to this question, one prosecutor said that

she could not supply the requested information at that moment. The record is silent as to whether a prosecutor was in attendance at the December 23 trial. Furthermore, the prosecution does not deny being in attendance and having knowledge of the manslaughter offenses. We would note that the respondent first claimed his rights under sections 3-3 and 3-4 on February 27, 1975 (Ill. Rev. Stat. 1973, ch. 37, par. 701-2(3)(a)), and that the State filed two responses, on April 4 and May 5. Neither response denied such attendance and knowledge.

The State argues that although the investigating police officer knew of the deaths as they occurred, one death immediately after the collision and the other a day later, such knowledge should not be attributed to the office of the State's Attorney, citing *People* v. *Pohl* (1964), 47 Ill. App. 2d 232, 197 N.E. 2d 759. In *Pohl,* it was held that the "proper prosecuting officer" means the State's Attorney and his assistants, not a police officer with actual knowledge of the facts. This holding was followed in *People* v. *Bressette* (1970), 124 Ill. App. 2d 469, __, 259 N.E. 2d 592, 594, where the court wrote:

> "Defendant suggests that modern police procedures, coupled with the statutory duties of a state's attorney to investigate possible crimes and attend prosecutions in the now unified circuit court, require that we impute the knowledge of the arresting officer to the state's attorney. We do not preclude a case in which the denial by a state's attorney that he has such knowledge may not be accepted where evidence in the record fairly points to a contrary conclusion, but this is not that case. * * * the subsequent prosecution was not barred because the previous charge was unknown to the proper prosecuting officer * * *."

The State contends that we should not presume that the prosecution had knowledge of the manslaughter offenses.

The State's Attorney for each county has the duty to attend court proceedings to prosecute felony and misdemeanor charges (Ill. Rev. Stat. 1973, ch. 14, par. 5.) "There is a presumption that the State's attorney performs the functions of his office according to the law and that he does his duty, which is a persumption regarding all officers but is not conclusive." (*People ex rel Hoyne* v. *Newcomer* (1918), 284 Ill. 315, 324.) A State's Attorney may rebut this presumption by denying that he was present to perform his official duties. In the absence of a denial, however, it must be presumed that he performed his statutory functions. In the context of the case at bar, it is presumed that an assistant State's Attorney attended respondent's trial on December 23 for FTRS, and that the prosecutor had full knowledge of the pertinent facts of the offense. The investigating officer's report states that two children died after being hit by respondent's vehicle. We believe and hold that in the context of this case, in the absence of a denial, the proper prosecuting officer is presumed to have had knowledge of the involuntary manslaughter offenses when the traffic offense was prosecuted. We would comment that in both *Pohl* and *Bressette,* the respective proper prosecuting officers actively denied knowledge of the other offenses, unlike the prosecutors in the instant case.

Since the requirements of section 3-3(b) were satisfied inasmuch as the offenses of involuntary manslaughter were known to the proper prosecuting officer at the time the prosecution for FTRS was commenced, were based upon the same act of driving in a manner likely to cause a collision as the offense of FTRS, and were within the jurisdiction of the juvenile division of the circuit court of Cook

County, the trial court properly held that the later prosecution for involuntary manslaughter in the form of a petition for adjudication of wardship was barred by section 3-4(b)(1).

For the abovementioned reasons, the order of the circuit court of Cook County granting respondent's motion for discharge of the juvenile petition for adjudication of wardship is affirmed.

Order affirmed.

McNAMARA, P. J. and MEJDA, J., concur.